(13)

Nos. 05-85 and 05-584

In the Supreme Court of the United States

POWEREX CORP., PETITIONER

v.

RELIANT ENERGY SERVICES, INC., ET AL.

POWEREX CORP. DBA POWEREX ENERGY CORP., PETITIONER

v.

STATE OF CALIFORNIA, EX REL. BILL LOCKYER, ATTORNEY GENERAL OF CALIFORNIA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether petitioner, which is wholly owned by a crown corporation that is itself wholly owned by the Canadian Province of British Columbia, and which performs obligations and exercises rights of the Province pursuant to treaties with the United States, is entitled to the protections of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1602 *et seq.*, as an "organ of a foreign state or political subdivision thereof," 28 U.S.C. 1603(b)(2).

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. The Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1602 *et seq.*, is "the sole basis for obtaining jurisdiction over a foreign state" in either state or federal court. *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989). The FSIA defines the term "foreign state" to include "an agency or instrumentality of a foreign state," 28 U.S.C. 1603(a), which, in turn, is defined to mean:

> any entity—(1) which is a separate legal person, corporate or otherwise, and (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

28 U.S.C. 1603(b). The FSIA "guarantees foreign states the right to remove any civil action from a state court to a federal court." *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 489 (1983) (citing 28 U.S.C. 1441(d)).

2. Petitioner is a corporation organized under the laws of the Province of British Columbia, a political subdivision of Canada. Petitioner is wholly owned by the British Columbia Power and Hydro Authority (BC Hydro), a provincial crown corporation that is in turn wholly owned by the Province of British Columbia. 05-85 Pet. App. 53a, 58a. As a crown corporation, BC Hydro is subject to the control and direction of

provincial officials, and BC Hydro pays its net revenue to the provincial government. *Id.* at 58a-59a.

Some of BC Hydro's responsibilities include implementing on behalf of Canada the Columbia River Treaty between the United States and Canada, which is designed to control the flow of the Columbia River for both flood control and power-generation purposes benefitting both nations. 05-85 Pet. App. 50a-51a.[1] Under the treaty-based management system, Canadian dams sometimes must release more water than would be optimal for their own power-generating purposes, in order to maintain water levels in the United States. *Id.* at 51a. In those circumstances, the treaty provides that the United States will reimburse BC Hydro (as assignee of Canada) for foregone power-generating opportunities. See *id.* at 51a, 55a.

BC Hydro generates more electric power than the Province needs. In 1988 BC Hydro created petitioner as a wholly owned subsidiary to market BC Hydro's excess power capacity to the United States, including the power to which Canada is entitled under the Columbia River Treaty. See 05-85 Pet. App. 53a, 55a. In addition, petitioner is responsible for providing power to the City of Seattle as required in the Skagit River Treaty between the United States and Canada.[2] See *id.* at 56a-57a. Petitioner's income is consolidated with that of BC Hydro and transferred either to the Province itself or to a special rate-stabilization account according to a formula specified by the Province. See *id.* at 202a-204a.

3. a. In No. 05-85, respondent plaintiffs—including the State of California and individual energy consumers—sued

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[1] See Treaty Between the United States of America and Canada Relating to Cooperative Development of the Water Resources of the Columbia River Basin, Jan. 17, 1961, 15 U.S.T. 1555; 05-85 Pet. App. 61a-137a.

[2] See Treaty Between Canada and the United States of America Relating to the Skagit River and Ross Lake, and the Seven Mile Reservoir on the Pend D'Oreille River, Apr. 2, 1984, T.I.A.S. No. 11088; 05-85 Pet. App. 138a-146a.

respondent cross-plaintiffs (among others) in California state court, seeking damages for alleged manipulation of the electricity market in violation of state law. The respondent cross-plaintiffs filed cross-complaints against several entities including petitioner, BC Hydro, and two federal government agencies, the Bonneville Power Administration (BPA) and the Western Area Power Administration (WAPA). The cross-complaints seek indemnification and allege that petitioner and the other cross-defendants participated in or contributed to the manipulation of energy markets.

Petitioner and BC Hydro filed notices removing the case to federal district court pursuant to the FSIA, 28 U.S.C. 1441(d). The federal agencies invoked 28 U.S.C. 1442(a)(1) as additional authority for removal. 05-85 Pet. App. 19a. The respondent plaintiffs moved to remand the case to state court. They argued that the court lacked jurisdiction to adjudicate the claims against BC Hydro and the federal agencies because they were immune from suit on the cross-claims, and that petitioner was not entitled to the protections of the FSIA because it was not an agency or instrumentality of British Columbia. See *id.* at 20a, 22a, 33a, 38a.

The district court granted the motion to remand. The court held that, as "a corporation wholly-owned by a political subdivision of a foreign government," BC Hydro qualified as a "foreign state" for purposes of the FSIA, 05-85 Pet. App. 21a (citing 28 U.S.C. 1603(a)), and that the claims against it did not fall within any of the FSIA's exceptions to immunity, see *id.* at 21a-33a. The court also held that BPA and WAPA were immune from suit, *id.* at 40a, and that because the state court had lacked jurisdiction over the claims against BPA and WAPA, by derivation, so did the federal court, *id.* at 43a-44a.

The district court concluded that petitioner did not come within the statutory definition of an agency or instrumentality, and therefore did not qualify as a "foreign state" under

the FSIA. 05-85 Pet. App. 33a-38a. The district court held that petitioner is not an "organ" of British Columbia because petitioner does not exercise regulatory authority, is not immune from suit under Canadian law, and is not subject to active oversight by the provincial government. *Id.* at 35a. The court also observed that the provincial government does not appoint petitioner's corporate officers, and petitioner's employees are not treated as civil servants. *Ibid.* Nor, the court held, is petitioner an agency or instrumentality under the "ownership" test, because the Province does not directly own a majority of petitioner's shares. *Id.* at 36a-38a.

The district court remanded the action to state court. 05-85 Pet. App. 44a. B.C. Hydro and the federal agency cross-defendants sought to clarify that the claims against them had been dismissed on immunity grounds, but the district court denied their requests. The court reasoned that, because it could not exercise jurisdiction over the claims against the immune defendants, it could not dismiss those claims, and was instead required by 28 U.S.C. 1447(c) to remand the entire action (including the claims as to which there was immunity) to state court. See C.A. E.R. (PWX) 900, 904.

b. Petitioner, respondent cross-plaintiffs, BPA and WAPA each appealed. 05-85 Pet. App. 8a-9a. Respondent cross-plaintiffs challenged the holding that BC Hydro, BPA and WAPA were immune from suit; BPA and WAPA appealed the district court's failure to dismiss the claims against them before remanding; and petitioner challenged the denial of its status as an agency or instrumentality of the Province. *Ibid.*

The court of appeals' opinion first held that 28 U.S.C. 1447(d) did not preclude appellate review of the district court's order. The court reasoned that the district court had removal jurisdiction over the case at the outset because of BC Hydro's status as a foreign state and BPA and WAPA's status as federal agencies. 05-85 Pet. App. 10a. Because the district

court had jurisdiction, and had exercised that jurisdiction to decide the claims of immunity and the status of petitioner, the court of appeals held that it was "not deprived by § 1447(d) of jurisdiction to review these substantive rulings." *Ibid.*

The court then held (on the appeal of the respondent cross-plaintiffs) that BC Hydro, BPA, and WAPA were entitled to immunity. 05-85 Pet. App. 11a, 14a. It also held (on the appeal of the federal agencies) that the district court erred in refusing to dismiss the claims against the federal agencies because, in a removed action, a defendant's immunity "is vindicated only by the district court's dismissal of the claims." *Id.* at 16a.

With respect to petitioner's appeal, the court of appeals affirmed the district court's conclusion that petitioner does not qualify as an "organ of a foreign state or political subdivision thereof," 28 U.S.C. 1603(b)(2). 05-85 Pet. App. 14a. The court stated that its determination of organ status would turn ultimately on "whether the entity engages in a public activity on behalf of the foreign government," and that it would "look to the purposes of an entity's activities, the entity's independence from government, the level of financial support received from the government, and the entity's privileges and obligations under the law." *Id.* at 15a (quoting *Patrickson* v. *Dole Food Co.*, 251 F.3d 795, 807 (9th Cir. 2001), aff'd on other grounds, 538 U.S. 468 (2003)). The court of appeals stated that petitioner, like the entities in *Patrickson*, "was not run by government appointees, was not staffed with civil servants, was not wholly owned by the government, was not immune from suit, and did not exercise any regulatory authority." *Id.* at 15a-16a. The court acknowledged that petitioner offered evidence that it "serves a public purpose," but concluded that petitioner's "high degree of independence from the government of British Columbia, combined with its lack of financial support from the government and its lack of special privileges

or obligations under Canadian law dictate [the] holding that PowerEx is not an organ of British Columbia." *Id.* at 16a.

4. In No. 05-584, respondent (the California Attorney General) sued petitioner in state court, alleging that petitioner had manipulated the energy market in violation of state law. 05-584 Pet. App. 4a-5a. Petitioner removed the case to federal district court, on the grounds that it is a foreign state under the FSIA and that respondents' claims necessarily raised federal questions. *Id.* at 5a. The district court remanded. *Id.* at 4a-15a. With respect to petitioner's FSIA argument, the district court relied on the Ninth Circuit's earlier decision at issue in No. 05-85. *Id.* at 14a.

Petitioner appealed to the Ninth Circuit, which sua sponte dismissed the appeal for lack of jurisdiction, citing 28 U.S.C. 1447(d), and this Court's decision in *Things Remembered, Inc.* v. *Petrarco*, 516 U.S. 124, 128 (1995). 05-584 Pet. App. 1a.

DISCUSSION

The court of appeals' application of the FSIA's "organ of a foreign state" provision, 28 U.S.C. 1603(b)(2), is erroneous and conflicts with decisions of other courts of appeals. Moreover, the issue is an important, recurring, and sensitive one that warrants this Court's consideration. Although respondents assert several purported obstacles to the Court's reaching that issue, we believe that the petition in No. 05-85 presents an appropriate vehicle for this Court's review. Accordingly, the United States suggests that the Court grant review on the first question presented in No. 05-85, and hold the petition in No. 05-584 pending resolution of No. 05-85.

I. THE COURT OF APPEALS MISAPPLIED AN IMPORTANT PROVISION OF THE FSIA, AND ITS ANALYSIS CONFLICTS WITH THAT OF OTHER CIRCUITS

A. The FSIA establishes a "comprehensive scheme" governing the extent to which "foreign sovereigns may be held

liable in a court in the United States." *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 496-497 (1983). In recognition of the fact that many states engage in commercial activities not unlike those of private actors, the FSIA codifies the "restrictive theory" of foreign sovereign immunity, according to which foreign states may be sued for their "commercial activities." *Id.* at 487-488. Although the FSIA denies immunity to foreign states in those circumstances, "[i]n view of the potential sensitivity of actions against foreign states and the importance of developing a uniform body of law in this area, the Act guarantees foreign states" certain procedural protections, such as the right to remove a civil action from state to federal court. *Id.* at 489. The FSIA also guarantees a foreign state the right to a bench, rather than jury, trial in federal court on claims as to which they are not immune, see 28 U.S.C. 1330(a), 1441(d).

Congress recognized that there are any number of ways in which foreign governments may organize their operations and functions, and it made certain that the FSIA would be flexible enough to accommodate that variety. Thus, Congress extended the protections of the FSIA to an "agency or instrumentality" of a foreign state, 28 U.S.C. 1603(a), and provided that entities could qualify as an "agency or instrumentality" in several ways, 28 U.S.C. 1603(b). The statutory definition establishes a categorical rule with respect to an entity "a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof." 28 U.S.C. 1603(b)(2). See *Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 474 (2003) (construing that categorical protection to require direct ownership by the foreign state or political subdivision). In contrast to that categorical rule, the other prong of the definition—"an organ of a foreign state or political subdivision"—is intended to have a more functional application that is not dependent on a particular form of organization. See

H.R. Rep. No. 1487, 94th Cong., 2d Sess. 15-16 (1976) (recognizing that an agency or instrumentality "could assume a variety of forms, including a state trading corporation, a mining enterprise, a transport organization such as a shipping line or airline, a steel company, a central bank, an export association, a governmental procurement agency or a department or ministry which acts and is suable in its own name").

This Court has never addressed the meaning or application of this prong of FSIA's definition of an agency or instrumentality, yet that provision has taken on additional importance since the Court's decision in *Dole Food*. Whereas before the *Dole Food* decision, entities such as petitioner were often afforded protection under the FSIA's majority-ownership test, those entities must now rely exclusively on the immunity for organs of foreign states. See, *e.g.*, *USX Corp.* v. *Adriatic Ins. Co.*, 345 F.3d 190, 199 (3d Cir. 2003) (noting that the district court had initially upheld the defendant's foreign state status under the majority-ownership test, but, after *Dole Food*, had reevaluated the question under the "organ of a foreign state" prong), cert. denied, 541 U.S. 903 (2004); *id.* at 208 ("A flexible approach is particularly appropriate after *Dole*, inasmuch as courts likely now will be asked to evaluate the possible organ status of a wide variety of entities controlled by foreign states through tiering arrangements and because of the widely differing forms of ownership or control foreign states may exert over entities.").

B. At first glance, the courts of appeals may appear to have adopted similar approaches to determining whether an entity qualifies as an organ of a foreign state. Each considers multiple factors including, *inter alia*, the circumstance of the entity's creation, its purpose, the involvement of the state in its affairs, its employment practices, any financial support or grant of exclusive economic rights from the state, and its privileges and obligations under local law. See 05-85 Pet. App.

15a; *Filler* v. *Hanvitt Bank*, 378 F.3d 213, 217 (2d Cir.), cert. denied, 543 U.S. 1022 (2004); *USX*, 345 F.3d at 209; *Patrickson*, 251 F.3d at 807;[3] *Kelly* v. *Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 846-847 (5th Cir.), cert. denied, 531 U.S. 979 (2000).

A closer study, however, reveals a critical divergence in the manner in which the various circuits apply their seemingly similar tests. The Third and Fifth Circuits, for example, have emphasized "the need for a * * * flexible approach under the organ prong of section 1603(b)(2)," *USX*, 345 F.3d at 208, and that a court should "*not* apply [the factors] mechanically or require that all five support an organ-determination," *Kelly*, 213 F.3d at 847. Moreover, those courts understand the need to apply the factors with constant reference to the ultimate question: whether the defendant is "an entity that engages in activity serving a national interest and does so on behalf of its national government." *USX*, 345 F.3d at 209. The relevance and weight of any particular factor in a given case depends on the extent to which it informs that ultimate test. See *id.* at 214 ("[w]eighing the[] factors qualitiatively as well as quantitatively").

Although the Ninth Circuit also makes reference to "the ultimate question," 05-85 Pet. App. 15a, in practice it proceeds mechanically through a checklist. Its analysis, in full, of the factors as they apply to petitioner in No. 05-85 was as follows:

> [Petitioner] was not run by government appointees, was not staffed with civil servants, was not wholly owned by the government, was not immune from suit, and did not exercise any regulatory authority. *Even though [petitioner]*

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[3] In *Patrickson*, the Ninth Circuit held that the foreign entity there was neither an organ of nor majority-owned by a foreign state or political subdivision. This Court granted a petition for a writ of certiorari to consider only the question of majority ownership.

> *offers some evidence that it serves a public purpose*, its high degree of independence from the government of British Columbia, combined with its lack of financial support from the government and its lack of special privileges or obligations under Canadian law dictate our holding that [petitioner] is not an organ of British Columbia.

Id. at 15a-16a (emphasis added) (citation omitted). In other words, the court of appeals disregarded the substantial evidence that petitioner "serves a public purpose" because it did not conform with the result indicated by the court's mechanical application of other specified factors. The court did not analyze those factors to see what light they shed on whether petitioner was serving the interests of the Province.

The crucial differences between the courts of appeals' approaches can best be appreciated by comparing the analysis of the Ninth Circuit in No. 05-85 with that of the Third Circuit in *USX*. For example, the Ninth Circuit found it significant that petitioner "was not immune from suit" under Canadian law. 05-85 Pet. App. 16a. In contrast, the Third Circuit determined that whether the defendant "is subject to suit" in its home country "should not be considered [as] part of the organ analysis." *USX*, 345 F.3d at 214. It noted that, in order to be an organ, "an entity *must* be a separate legal person" and that "the right to sue and be sued [is] one factor to consider" in that analysis. *Id.* at 214 & n.24; *id.* at 209 n.17 (citing H.R. Rep. No. 1487, *supra*, at 15).[4] Similarly, whereas the Ninth Circuit counted the fact that petitioner engaged in commercial, rather than regulatory, activities against it, 05-85 Pet.

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[4] The Ninth Circuit's focus on petitioner's lack of immunity in Canada as a basis to deny petitioner all of the protections of the FSIA is particularly inappropriate when the entity engages in commercial activities that Congress likewise determined should not be protected by foreign sovereign immunity in the United States (even though an organ of a foreign state engaging in such activities would still enjoy the other protections of the FSIA).

App. 16a, the Third Circuit cautioned that "too heavy a focus on the commercial nature of an entity's activities would tend to confuse the question of the level of protection provided by the FSIA (full immunity or not) with the antecedent question * * * whether the entity comes within the purview of the FSIA at all," *USX*, 345 F.3d at 210.

The Ninth Circuit also determined as a factor against petitioner that it was "not wholly owned by the government," 05-85 Pet. App. 15a-16a, by which it meant that petitioner "is not owned by the Province, but by BC Hydro," *id.* at 16a. But that improperly weights the inquiry against treating an entity as an organ of a foreign state. That inquiry will generally be salient only for entities that do not satisfy the majority-ownership test. Such entities should not start the inquiry whether they satisfy Section 1603(b)(2)'s alternative standard with one strike against them. In contrast, the Third Circuit found that when a foreign government "has complete control over all shares of [the defendant] albeit through a tiered arrangement," by which the subsidiary serves the government's purposes, "this factor weighs in favor of a finding of organ status." *USX*, 345 F.3d at 213.

Similarly, whereas the Ninth Circuit emphasized that petitioner is "not staffed with civil servants," 05-85 Pet. App. 15a, the Third Circuit held that fact to be "of little relevance," and emphasized instead the fact that a government minister approved the entity's administrator, *USX*, 345 F.3d at 212-213. And, in contrast to the Ninth Circuit, which held that the Province's assignment to petitioner of the Province's entitlement to hydro-electric power under the Columbia River Treaty did not qualify as "financial support from the government," 05-85 Pet. App. 16a, the Third Circuit observed that the exploitation and distribution of natural resources is a "government purpose" that "would weigh * * * heavily in favor of organ status," *USX*, 345 F.3d at 210 (citing *Kelly*, 213 F.3d at 848, and

Corporacion Mexicana de Servicios Meritimos, S.A. de C.V. v. *M/T Respect*, 89 F.3d 650, 654-655 (9th Cir. 1996)).

C. A proper analysis of the question demonstrates that petitioner is an organ of the Province.[5] Under the proper approach, the court of appeals should have focused on the fact that petitioner was created for the purpose of marketing for export the Province's excess resource—electric power—including, in particular, marketing Canada's entitlement to power generated by BPA pursuant to the Columbia River Treaty and providing power to the City of Seattle as required of the Province in the Skagit River Treaty. See 05-85 Pet. App. 55a, 56a-57a. Rather than emphasizing that the Province does not provide direct financing to petitioner, it should have focused on the fact that petitioner plays an important role in discharging Canada's treaty obligations, that the Province assigned to petitioner its rights to Canada's entitlement under the Columbia River treaty, "a very significant resource," *id.* at 55a, and that petitioner's net income is returned to the Province via BC Hydro's consolidated income statements, see *id.* at 202a-204a. Instead of counting against petitioner the fact that its employees are not civil servants, the court should have emphasized that members of petitioner's board of directors are appointed by BC Hydro's board, which is appointed by the Provincial Lieutenant Governor, and that outside members of petitioner's board "were subject to concurrence by the Office of the Premier," *id.* at 58a-59a. Rather than declaring that petitioner is "not wholly owned by the government," *id.* at 15a-16a, it should have attached significance to the fact that the Province owns 100% of BC Hydro, which in turn owns 100% of petitioner. On a proper analysis, the court of appeals

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[5] The United States believes the courts below erred in failing to recognize petitioner's status as an organ of British Columbia that is entitled to the procedural protections of the FSIA, but takes no position on the merits of the claims at issue in these cases.

should have concluded that petitioner is an organ of the Province of British Columbia.[6]

II. THE QUESTION PRESENTED IS AN IMPORTANT ONE, AND NO. 05-85 IS AN APPROPRIATE VEHICLE IN WHICH TO RESOLVE IT

A. As noted above, a proper understanding of the "organ" prong is of considerable significance under the FSIA in light of *Dole Food*'s clarification of the majority-ownership test for agency or instrumentality status. See *USX*, 345 F.3d at 208 (quoted at p. 8, *supra*). A proper application of that prong is particularly important in this case. Canada is our Nation's largest trading partner, and Canada and its Provinces have numerous crown corporations that engage in trade with the United States. See 05-85 Pet. 24-25. Petitioner was created by BC Hydro—the Province's statutory agent for the promotion of hydroelectric development—specifically to market BC Hydro's surplus electric power outside the Province, including power the Province is entitled to receive or obligated to provide under treaties between the United States and Canada. Petitioner marketed power valued at approximately $11 billion Canadian between 2000 and 2004, see *ibid.*, and a large part of that power goes to States in the Ninth Circuit. Thus, if the court of appeals' decision is not overturned, it will bind petitioner in virtually all suits brought against it.

B. The respondent plaintiffs in No. 05-85 do not attempt to defend the merits of the court of appeals' classification of

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[6] As noted in the text, the fact that petitioner is 100% owned by a crown corporation that is, in turn, the statutory agent of and wholly owned by the Province is highly significant to petitioner's status as an organ of the Province. Petitioner also urges that the fact that BC Hydro owns Powerex as the Province's agent warrants a finding that petitioner satisfies the "ownership" prong, based on a case-by-case analysis. See 05-85 Pet. i, 29. The Court need not grant review on that question because petitioner qualifies as an "organ" under a correct application of the FSIA.

petitioner. Rather, they urge that the court of appeals' approach to the issue is not "new or different," 05-85 Br. in Opp. 6, and that, in any event, the Court cannot decide the issue because 28 U.S.C. 1447(d) precludes appellate review of the district court's remand order, 05-85 Opp. 4, and because plaintiffs' claims have been settled and dismissed, *id.* at 6. The first argument is incorrect, as we have demonstrated, see pp. 6-13, *supra*, and the other objections are not well founded.

1. In No. 05-85, the court of appeals held that it had "jurisdiction to review the district court's ruling on substantive issues of controlling law on the merits of the case." Pet. App. 6a. That conclusion was correct. The district court plainly had subject-matter jurisdiction at the time of removal, and its subsequent rulings did not divest it of that jurisdiction. Appellate review of the district court's remand order is therefore not barred by 28 U.S.C. 1447(d).[7]

This Court has made clear that Section 1447(d) must be read in *pari materia* with 28 U.S.C. 1447(c). See *Thermtron Prods., Inc.* v. *Hermansdorfer*, 423 U.S. 336, 343 (1976). "[O]nly remands based on grounds specified in § 1447(c) are immune from review under § 1447(d)." *Things Remembered,*

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[7] A similar issue relating to appeal from the denial of immunity under the Federal Employees Liability Reform and Tort Compensation Act of 1988, 28 U.S.C. 2679(d), is presented in *Osborn* v. *Haley*, No. 05-593 (argued October 30, 2006). Although the Court could hold this case pending resolution of *Osborn*, the better course would be to grant the petition in 05-85 outright and without waiting for a final decision in *Osborn*. If appellate jurisdiction is upheld in *Osborn*, that will only underscore that jurisdiction is appropriate here. On the other hand, if the Court finds appellate jurisdiction to be lacking in *Osborn*, it will be important to clarify that a similar result does not apply in the FSIA context, when the effect of such a rule would be to defeat Congress's judgment that questions regarding entitlement to the protections of the FSIA be decided in federal court if a foreign government entity elects a federal forum—at least where, as here, an entity that both courts below found *is* a foreign state (BC Hydro) also remains as a party to the case on remand.

Inc. v. *Petrarca*, 516 U.S. 124, 127 (1995). See *Kircher* v. *Putnam Funds Trust*, 126 S. Ct. 2145, 2153 (2006) (same). Thus, this Court has reviewed a remand order based on a district court's crowded docket, *Thermtron*, 423 U.S. at 340-341, a remand based on abstention, *Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706, 710-712 (1996), and the discretionary remand of state law claims after the federal law claims that had supported removal were eliminated from the case, *Carnegie-Mellon Univ.* v. *Cohill*, 484 U.S. 343, 348 (1988). Each of those cases was properly removed to federal district court, the district court therefore was properly vested with jurisdiction from the outset, and the purported ground for the remand was not one authorized by Section 1447(c).[8]

One ground for remand provided in Section 1447(c) is lack of subject matter jurisdiction. But that reference must be understood, and has been understood by the majority of the courts of appeals, as limited to remand orders for a lack of subject matter jurisdiction at the time of removal.[9] That

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[8] *Cohill* held that "Section[] * * * 1447(c) * * * do[es] not apply to cases over which a federal court has pendent jurisdiction," and that therefore "the remand authority conferred by the removal statute [Section 1447(c)] and the remand authority conferred by the doctrine of pendent jurisdiction overlap not at all." 484 U.S. at 355 n.11. It follows from *Cohill*'s holding that a discretionary remand of pendent claims is not a remand under Section 1447(c) and such a remand is not within Section 1447(d)'s bar to appellate review. See *Kircher*, 126 S. Ct. at 2153. But see *Things Remembered*, 516 U.S. at 130 (Kennedy, J., concurring) (stating that *Cohill* did not decide "whether subsection (d) would bar review" of orders remanding pendent claims as a matter of discretion).

[9] See, *e.g.*, *Letherer* v. *Alger Group, L.L.C.*, 328 F.3d 262, 265 (6th Cir. 2003) ("appellate review of remand orders is prohibited only where the district court remands because it lacks subject matter jurisdiction at the time of removal"); *Poore* v. *American-Amicable Life Ins. Co.*, 218 F.3d 1287, 1290-1291 (11th Cir. 2000); *Transit Cas. Co.* v. *Certain Underwriters at Lloyd's*, 119 F.3d 619, 623 (8th Cir. 1997), cert. denied, 522 U.S. 1075 (1998); *Trans Penn Wax Corp.* v. *McCandless*, 50 F.3d 217, 223 (3d Cir. 1995); *In re Amoco Petroleum Additives Co.*, 964 F.2d 706, 708-709 (7th Cir. 1992). But see *Linton* v. *Airbus Industrie*,

reading is consistent with the general rule that a federal court's subject matter jurisdiction is fixed at the time the suit is brought and is not defeated by subsequent acts. See, *e.g.*, *Grupo Dataflux* v. *Atlas Global Group, L.P.*, 541 U.S. 567, 574 (2004); *Freeport- McMoRan,Inc.* v. *KN Energy, Inc.*, 498 U.S. 426 (1991), cert. denied, 502 U.S. 1122 (1992); *St. Paul Mercury Indem. Co.* v. *Red Cab Co.*, 303 U.S. 283, 294 (1938).

That reading is also consistent with the history of the removal statutes. Before 1988, the text of Section 1447(c) made explicit that it authorized remand based only on defects at the time of removal. It allowed remand "[i]f at any time before final judgment it appears that the case was removed improvidently and without jurisdiction." 28 U.S.C. 1447(c) (1982). In 1988, Congress amended Section 1447(c) to distinguish between two types of defects in removal jurisdiction—a defect in removal procedure, and a defect in the district court's subject matter jurisdiction—and to provide that procedural defects are waived if not raised promptly. The amended provision specified that "a motion to remand the case on the basis of any defect in removal procedure must be made within 30 days" of removal, while it continued to require remand "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction." Pub. L. No. 100-702, § 1016(c)(1), 102 Stat. 4670. In 1996, the provision was again amended to clarify that waivable objections to removal include "any defect other than lack of subject matter jurisdiction." Pub. L. No. 104-219, § 1, 110 Stat. 3022.

As a number of courts of appeals have concluded, after reviewing the change in statutory text and the legislative history, "the proper inquiry is still whether the court had jurisdiction at the time of removal." *Poore*, 218 F.3d at 1290. See

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30 F.3d 592, 599-600 (5th Cir.) ("jurisdictional remands premised on post-removal events are not reviewable"), cert. denied, 513 U.S. 1044 (1994).

Van Meter v. *State Farm Fire & Cas. Co.*, 1 F.3d 445, 450 n.2 (6th Cir. 1993); *In re Shell Oil Co.*, 966 F.2d 1130, 1133 (7th Cir. 1992). Congress did not intend to depart from the well established rule "that jurisdiction present at the time a suit is filed or removed is unaffected by subsequent acts." *Id.* at 1133. Rather, Congress's focus in adopting the textual change was on ensuring that plaintiffs raise promptly any objection to removal on purely procedural grounds. See H.R. Rep. No. 889, 100th Cong., 2d Sess. Pt. 1, at 72 (1988). The statute's current structure bears that out. The reference in the first sentence of Section 1447(c) to "any defect other than lack of subject matter jurisdiction" makes clear that by the phrase "lack of subject matter jurisdiction" Congress means a particular, non-waivable, "defect" in removal.[10]

In this case, the district court stressed that no party contested that the actions could be removed pursuant to 28 U.S.C. 1441 and 1442. See 05-85 Pet. App. 20a. That recognition of the propriety of the court's removal jurisdiction at the outset is entirely correct and is, in itself, sufficient to take this case outside the scope of Section 1447(d). The district court itself recognized (and the court of appeals affirmed) that, as a crown corporation wholly owned by the Province of British Columbia, BC Hydro qualifies as an agency or instrumentality of Canada and therefore as a foreign state under 28 U.S.C. 1603(a) and (b). 05-85 Pet. App. 12a-14a, 21a. Therefore BC

[10] The legislative history of the 1988 change also reflects that Congress understood the mandatory (and unreviewable) remand for lack of subject matter jurisdiction at the time of removal that is referred to in Section 1447(c) to be distinct from a discretionary remand after the court had exercised its removal jurisdiction to resolve disputed federal questions. See H.R. Rep. No. 889, *supra*, at 72 (emphasizing that "[t]he amendment is written in terms of a defect in 'removal procedure' in order to avoid any implication that remand is unavailable after disposition of all federal questions leaves only State law questions that might be decided as a matter of ancillary or pendent jurisdiction or that instead might be remanded").

Hydro had the right to remove the action under 28 U.S.C. 1441(d) in order to have its claim of immunity decided by a federal, rather than state, forum. See *ibid.* ("Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court."). The district court did, in fact, exercise its removal jurisdiction to adjudicate BC Hydro's claim of immunity, which the court upheld. 05-85 Pet. App. 21a-33a. As federal agencies, BPA and WAPA were likewise entitled to remove the action pursuant to 28 U.S.C. 1442(a)(1) and have their immunity from suit adjudicated by the federal district court, which they did. See 05-85 Pet. App. 7a, 39a-40a; see *Kircher*, 126 S. Ct. at 2155 n.12 (noting that under Section 1442(a), the federal defendant need only raise a "colorable" defense of federal immunity in order to remove, because that section "reflects a congressional policy that 'federal officers, indeed the Federal Government itself, require the protection of a federal forum'") (quoting *Willingham* v. *Morgan*, 395 U.S. 402, 407 (1969)).[11]

Because (as the district court recognized, 05-85 Pet. App. 20a) removal by BC Hydro, BPA, and WAPA was proper, the

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[11] The logic of respondent plaintiffs' argument against appellate jurisdiction would appear to be that the court of appeals did not even have jurisdiction over the appeals by BPA and WAPA from the district court's refusal to dismiss them from the case rather than remanding the case back to state court with those federal agencies as parties, even though no party contested in district court that the cases were properly removed based on the presence of those agencies as defendants, see 05-85 Pet. App. 20a, and the district court correctly determined that both agencies were immune from suit. That result would deprive federal agencies of an important protection afforded by the removal statute (and sovereign immunity): the ability to remove the case from state court for the very purpose of securing dismissal from the case on immunity grounds at the outset. See S. Rep. No. 366, 104th Cong., 2d Sess. 30-31 (1996) (Section 1442(a)(1) reflects "Congress' intent that questions concerning * * * the scope of Federal immunity * * * be adjudicated in Federal court").

district court had subject-matter jurisdiction over the entire case irrespective of the sovereign status of petitioner. See, *e.g.*, *USX*, 345 F.3d 190; *Nolan* v. *Boeing Co.*, 919 F.2d 1058 (5th Cir. 1990), cert. denied, 499 U.S. 962 (1991); see also H.R. Rep. No. 1487, *supra*, at 32. The bar to appellate review in Section 1447(d) therefore does not apply to any remand order entered by the district court after it had resolved the immunity questions properly brought before it.[12]

Because the court of appeals correctly concluded that it had appellate jurisdiction over the appeal in No. 05-85, the Court should grant review in that case limited to the question of petitioner's status as an organ of a foreign state. In contrast, in No. 05-584, the court of appeals concluded that it lacked jurisdiction. 05-584 Pet. App. 1a. Although the court of appeals cited Section 1447(d) as the basis for dismissing the appeal, there is some dispute as to whether that holding was, in fact, based on the panel's understanding that the prior panel decision in No. 05-85 compelled the conclusion that the case had not been properly removed. See 05-584 Reply 3-4. Because the court of appeals' one page order does not lend itself to a full consideration of the issue by this Court, we sug-

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[12] Although the district court invoked Section 1447(c) as the basis for its remand, that court's characterization of its action is not binding on this Court as to the scope of its appellate jurisdiction. See, *e.g.*, *United States* v. *Jorn*, 400 U.S. 470, 478 n.7 (1971) (plurality opinion of Harlan, J.) ("the trial judge's characterization of his own action cannot control the classification of the action for purposes of our appellate jurisdiction"); *United States* v. *Sisson*, 399 U.S. 267, 279 n.7 (1970). The reviewing court must determine its own jurisdiction independently. See *Liberty Mut. Ins. Co.* v. *Wetzel*, 424 U.S. 740, 742 (1976) (court of appeals erred in accepting the district court's "recital" that final judgment had been entered when the record showed the contrary); *Things Remembered*, 516 U.S. at 134 (Ginsburg, J., concurring).

gest that the Court hold the petition in No. 05-584 and dispose of it consistent with the disposition of No. 05-85.[13]

Finally, the settlement agreement reached between the plaintiff and respondent cross-plaintiffs in No. 05-85 does not moot the petition. Although the respondent cross-plaintiffs have apparently offered to dismiss the cross-claims, any such dismissal would be without prejudice to reinstating them if the underlying settlement with the plaintiffs is overturned. See 05-85 Reply 2-3. Petitioner has not agreed to settle on those terms. *Ibid.* Moreover, it is our understanding that certain parties object to the settlement and have recently filed appeals concerning their objections in the state courts. See Wholesale Electricity Antitrust Cases I & II, J.C.C.P. No. 4204 (Cal. Super. Ct. San Diego County), State of Montana's Notice of Appeal (July 28, 2006). Thus, the petition is not now moot, and this Court would almost certainly resolve the case before the settlement between the plaintiff and respondent cross-plaintiffs becomes final.

CONCLUSION

The petition for a writ of certiorari in No. 05-85 should be granted limited to the first question presented. The petition for a writ of certiorari in No. 05-584 should be held pending resolution of No. 05-85 and then disposed of as appropriate in light of the disposition of that case.

Respectfully submitted.

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[13] A typical remand order merely determines which of two acceptable fora will adjudicate the plaintiff's claim, and Congress has determined that interests of efficiency warrant barring appellate review of that decision. See *Kircher*, 126 S. Ct. at 2156. In contrast, Congress has specifically determined that proper treatment of foreign states and their agencies and instrumentalities demands that they be afforded a federal forum, in which they would be subject to trial only by a judge. Congress should not lightly be taken to have intended for those benefits to be irretrievably lost by a district court's erroneous ruling.

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